Supreme Court, U.S.
FILED
MAR 23 1992
OFFICE OF THE CLERK

No. 91-1420

In the
Supreme Court of the United States
October Term, 1991

JOAN GROWE, SECRETARY OF STATE
OF THE STATE OF MINNESOTA, et al.
Appellants,

v.

JAMES EMISON, et al.
Respondents.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

APPELLEES' MOTION TO DISMISS APPELLANTS' JURISDICTIONAL STATEMENT

Bruce D. Willis
(Counsel of Record)
Mark B. Peterson
Patrick A. Reinken
POPHAM, HAIK, SCHNOBRICH
& KAUFMAN, LTD.
3300 Piper Jaffray Tower
222 South Ninth Street
Minneapolis, Minnesota 55402
(612) 333-4800

Attorneys for Appellees
Emison, et al.

1992 — Bachman Legal Printing, 835 Second Ave. So., Mpls., MN 55402 — (612) 339-9518
■ FAX 612-337-8053

O'NEILL, BURKE, O'NEILL, LEONARD
AND O'BRIEN, LTD.
Joseph T. O'Neill
Eldon J. Spencer, Jr.
800 Norwest Center
55 East Fifth Street
St. Paul, Minnesota 55101
(612) 227-9505

Attorneys for Appellees
Benson, Dempsey, Hettig, Harmon, Peterson, Pidcock, and Ringsmuth

NICKLAUS LAW FIRM
Robert A. Nicklaus
P.O. Box 116
103 West Second Street
Chaska, Minnesota 55318
(612) 448-4747

LANG, PAULY & GREGERSON, LTD.
Mark A. Johnson
Todd A. Settler
4400 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
(612) 338-0755

Attorneys for Defendant
Mark Lundgren, Carver County Auditor, individually and on behalf of all County Auditors of the State of Minnesota

No. 91-1420

In the Supreme Court of the United States

October Term, 1991

Joan Growe, Secretary of State of the State of Minnesota, Patricia Cotlow, Phillip Krass, Sharon LaComb, James Stein, and Theodore Suss, individually and on behalf of all citizens of Minnesota similarly situated; Patrick O'Connor, Hennepin County Auditor, individually and on behalf of all County Auditors of the State of Minnesota; the Seventy-seventh Minnesota State House of Representatives; and the Seventy-seventh Minnesota State Senate,

Appellants,

vs.

James Emison, Judy Fairbanks, Marie Iverson, Ken Dean, Steve Castillo, Lew Freeman, and Yao Lo, individually and on behalf of all Citizen and Voters of the State of Minnesota similarly situated; Duane Benson, Terry Dempsey, Delores Hettig, Richard Harmon, David E. Peterson, E.M. Patricia Pidcock, and Frank Ringsmuth; and Mark Lundgren, Carver County Auditor, individually and on behalf of all County Auditors of the State of Minnesota,

Appellees.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i
TABLE OF AUTHORITIES iii
STATEMENT OF PURPOSE 1
STATEMENT OF FACTS 1
ARGUMENT 5

I. THE FEDERAL COURT ACTED PROPERLY IN EXERCISING ITS JURISDICTION AND IN NOT DEFERRING TO THE STATE COURT 5

A. The Federal Court's Actions Were Entirely Consistent with Germano Deference while the State Court Violated Those Deference Requirements 5

B. Abstention by the Federal Court Was Not Warranted in Light of Voting Rights Claims Before It, and Only the Federal Court Was Capable of Resolving All Issues Raised by the Parties in Both Actions 8

II. THE STATE COURT'S PLAN FOR LEGISLATIVE REDISTRICTING WAS NOT ENTITLED TO ISSUE PRECLUSIVE EFFECT. 10

III. THE FEDERAL COURT ACTED PROPERLY IN ADJUDICATING THE VOTING RIGHTS ACT CLAIMS BEFORE IT, AND ITS ORDER WAS SUPPORTED BY THE EVIDENCE 12

A. The Federal Court Had an Affirmative Obligation to Address the Voting Rights Act Claims Before It 12

B. The Federal Court Properly Found Voting Rights Act Violations 13

1. The Federal Court Was Not Obligated First to Find That the Gingles Preconditions Were Met. 13

2. The Evidence of Voting Rights Act Violations Clearly Was Sufficient 14

IV. THE FEDERAL COURT ACTED IN ACCORD WITH STATE POLICY AND ALL REQUIREMENTS FOR COURT-ORDERED REDISTRICTING 19

A. The Federal Court's Plans Are Properly Based on State Policy 19

B. The Federal Court Was Not Bound by Weiser or Upham to Follow Chapter 246, Chapter 246 As the Legislature Proposed to Amend It, or Chapter 246 As Adopted by the State Court 22

1. Chapter 246 Was Not Entitled to Deference As State Policy 23

2. The Proposed Amendments to Chapter 246 Were Not Entitled to Deference As State Policy 26

3. Appellant Legislature's Congressional Plan Was Not Entitled to Deference As State Policy 26

V. THE CLAIMS ASSERTED BEFORE THE FEDERAL COURT WERE NOT RENDERED MOOT. 27

CONCLUSION 27

TABLE OF AUTHORITIES

FEDERAL CASES

Baker v. Carr, 369 U.S. 186 (1962) 21

Booker v. Special School Dist. No.1, Minneapolis, 451 F. Supp. 659 (D. Minn. 1978) 16

Booker v. Special School Dist. No.1, Minneapolis, 351 F. Supp. 799 (D. Minn. 1972) 16, 17

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) 9, 10

County of Los Angeles v. Davis, 440 U.S. 625 (1979) .. 27

Harman v. Forssenius, 380 U.S. 528 (1965) 5, 6, 9

Karcher v. Daggett, 466 U.S. 910 (1984) 24

LaComb v. Growe, 541 F. Supp. 145 (D. Minn. 1982) .. 19

Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985) 10, 11

McClellan v. Carland, 217 U.S. 268 (1910) 9

O'Hair v. White, 675 F. 2d 680 (5th Cir. 1982) 8, 9

Reynolds v. Simes, 377 U.S. 533 (1964) 6, 21

Scott v. Germano, 381 U.S. 407 (1965) 3, 5, 6, 7

Skolnick v. State Election Bd. of Illinois, 336 F. Supp. 839 (N.D. Ill. 1971) 6

Smiley v. Holm, 285 U.S. 355 (1932) 6

Sterling v. Constantin, 287 U.S. 378 (1932) 9

Thornburg v. Gingles, 478 U.S. 30 (1986) 14

Upham v. Seamon, 456 U.S. 37 (1982) 6, 23, 24, 25

Wesberry v. Sanders, 376 U.S. 1 (1964) 21

White v. Weiser, 412 U.S. 783 (1973) 6, 8, 23, 24, 25

STATE CASES

Denzer v. Frisch, 430 N.W. 2d 471 (Minn. Ct. App. 1988) 12

Ellis v. Minneapolis Comm'n on Civil Rights, 319 N.W. 2d 702 (Minn. 1982) 11, 12

Handle With Care v. Department of Human Serv., 406 N.W. 2d 518 (Minn. 1987) 23

Margo-Kraft Distrib., Inc. v. Minneapolis Gas Co., 200 N.W. 2d 45 (Minn. 1972) 11

CONSTITUTIONAL PROVISIONS

Minnesota Constitution, article 4, § 2 20

Minnesota Constitution, article 4, § 3 24

STATUTES AND RULES

28 U.S.C. § 1331 8

28 U.S.C. § 1343 8

28 U.S.C. § 1738 ..... 10, 11

28 U.S.C. § 2284(a) 1

42 U.S.C. § 1973 ..... 1, 8, 13, 14, 15

Fed. R. Civ. P. 52(a) 13

OTHER AUTHORITIES

Polsby and Popper, The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering, 9 Yale Law & Policy Review 301 (1991) 20, 21, 22

S. Rep. No. 417, 97th Cong., 2d Sess. 28-29, reprinted in 1982 U.S. Code Cong. & Admin. News 177, 206-07 ..... 14, 15, 16, 18

13A C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3553 (1984, supp. 1991) 27

13A C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3533.2 (1984, supp. 1991) 27

18 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 4402 (1981, supp. 1991) 10

18 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 4404 (1981, supp. 1991) 10, 11

18 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 4469 (1981, supp. 1991) 10

STATEMENT OF PURPOSE

This motion is brought to dismiss an appeal of an order and plans of legislative and congressional redistricting issued by a three-judge panel of the United States District Court for the District of Minnesota by an Order dated February 19, 1992.

STATEMENT OF FACTS

The underlying federal action is a consolidation of two separate cases involving numerous parties.[1] A three-judge panel of the United States District Court was formed on April 8, 1991, pursuant to 28 U.S.C. § 2284(a) (1988), in response to the first action brought March 18, 1991, by plaintiffs below, appellees here, James Emison, et al. ("the Emison appellees"). The complaint alleged that existing state legislative and congressional districts violated the Fourteenth Amendment to the United States Constitution and that existing legislative districts violated § 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1988), and requested affirmative relief. See Emison v. Growe, Civ. No. 4-91-202, Amended Complaint (D.Minn., March 29, 1991) ("Emison Complaint"), App. at A-73-91.

A second federal action was filed on August 9, 1991, by

---

[1]The representation of political interests was specifically noted by the federal court: "Throughout this litigation the Emison plaintiffs and the Benson plaintiffs, infra, have represented the interests of the Independent-Republican (IR) political party. The legislative intervenors represent the interests of the Democratic-Farmer-Labor (DFL) political party. The Cotlow intervenors are aligned with the interests of the defendant intervenors . . . ." See Emison v. Growe, Civ. No. 4-91-202, Memorandum Opinion and Order (D. Minn., Feb. 19, 1992) ("February 19 Order"), Appendix to Jurisdictional Statement (hereinafter "App. at A-_") at A-17 n.9.

plaintiffs below, appellees here, Duane Benson, et al. ("the Benson appellees").[2] The Benson appellees sought to have declared unconstitutional a vetoed legislative redistricting plan that became law as Minnesota Laws 1991, Chapter 246, after litigation determined the veto to be invalid on procedural grounds. See Benson v. Growe, Civ. No. 4-91-603, First Amended Complaint, (D. Minn., Aug. 9, 1991) ("Benson Complaint"), Supplemental Appendix (hereinafter "Supp. App. at Sa-__") at 63.

A state court action was commenced on January 24, 1991. See Cotlow v. Growe, C8-91-985, Complaint (Minn.D.Ct., Jan. 24, 1991), App. at A-174. The state court plaintiffs, whom the federal court found to be aligned with DFL interests, intervened in the federal action, and are among appellants here. See February 19 Order, App. at A-17 n.9.

The initial non-adversarial nature of the state proceeding is demonstrated by the parties' written stipulation to jurisdiction, standing, and substantive resolution of all legal claims short of final relief. See Cotlow v. Growe, MX 91-001562, Stipulation (Minn.D.Ct., Feb. 25, 1991), App. at A-192-195. The plaintiffs opposed intervention by parties representing other political interests until a July 26, 1991, pre-trial conference. See Cotlow v. Growe, MX 91-001562, Pretrial Order No. 1 (Minn. Spec. Redis. Panel, July 29, 1991), App. at A-198-201. The state proceeding included none of the federal plaintiffs.

The federal action also presented legal claims not pled in the state action. The state court pleadings contained no Voting Rights Act claim, and plaintiff-intervenors in that case consistently argued against the state court's jurisdiction to consider such claims. See Cotlow v. Growe,

[2]The Emison and Benson appellees are citizens from various geographical parts of the state of Minnesota, and include Caucasian, Native American, Asian-Pacific, African-American, and Hispanic voters. See February 19 Order, App. at A-14.

C8-91-985, Memorandum of Plaintiff-Intervenors Regarding Exclusive Federal Jurisdiction Over Voting Rights Act Claims (Minn. Spec. Redis. Panel, Oct. 7, 1991), Supp. App. at SA-107. Those pleadings also did not challenge the constitutionality of Chapter 246.

Following the initial pretrial conference before the federal court on July 22, 1991, appellant legislature moved the federal court to stay its hand in deference to a scheduled session of the state legislature in January 1992 or to the state court proceedings. The federal court unanimously concluded that applicable law required both the state and federal courts to defer to and to provide the legislature with an adequate opportunity to effect redistricting in its January 1992 session.[3] See Emison v. Growe, Civil No. 4-91-202, Memorandum Opinion and Order (D.Minn. Aug. 21, 1991) ("August 21 Order"), App. at A-106. However, the federal court retained jurisdiction to address any subsequent redistricting plan in light of voting rights claims alleged and to avoid the delay that would occur from likely appeal of any state court action following the January 1992 legislative session.[4] See id., App. at

[3]At the time of the motions, the state legislature was scheduled to reconvene in January 1992, specifically to address redistricting. In fact, appellant legislature asked the federal court to defer to the legislature, which represented that it would pass, and the Governor would sign or his veto would be overridden, valid plans for both legislative and congressional redistricting. See February 19 Order, App. at A-19-20. The federal court relied on these representations. See August 21 Order, App. at A-109.

[4]The federal court properly recognized that the state court would also have to defer to the legislative process given the requirements of Scott v. Germano, 381 U.S. 407 (1965). See August 21 Order, App. at A-115. Any appeal of a state court decision issued after the legislature met in its 1992 session would necessarily progress first through the Minnesota state appellate process and only then to the United States Supreme Court. See August 21 Order, App. at A-112, A-116. The federal court specifically noted the effect of the resulting appellate delay as grounds for asserting continued jurisdiction. See id.

A-112-118. The federal court appointed special masters to assist in developing contingent redistricting plans if the legislative process failed to produce valid plans by January 20, 1992. See id., App. at A-117. It denied appellant legislature's motion to abstain. In light of its determination regarding deference to legislative process, the court also denied a motion to stay the state court proceeding. Id.

Chapter 246 was found unconstitutional by the state court sua sponte on October 1, 1991. See Cotlow v. Growe, C8-91-985, Pretrial Order No. 4 (Minn. Spec. Redis. Panel, Oct. 1, 1991), App. at A-218-220, A-225. That court found that Chapter 246 violated the state and federal constitutions because of numerous defects, including noncontiguous districts. See id., App. at A-219-220. Nevertheless, without waiting for the legislature to reconvene in January 1992, the state court on December 9, 1991, issued a legislative redistricting plan. See Cotlow v. Growe, C8-91-985, Findings of Fact, Conclusions of Law and Order ("State Court Legislative Plan") (Minn. Spec. Redis. Panel, Dec. 9, 1991), App. at A-249. That plan essentially adopted proposed amendments to Chapter 246 that later were passed by the legislature but vetoed by the Governor.

The federal court also recognized the unconstitutionality of Chapter 246, citing "numerous infirmities, including excessive population disparities and noncontiguous districts." See February 19 Order, App. at A-43. Because of extensive defects in Chapter 246 and its perpetuation of Voting Rights Act violations, the federal court disregarded it in redrawing legislative districts. See id., App. at A-43, A-56; see also Emison v. Growe, Civil No. 4-91-202, Order Denying Stay (D.Minn., March 9, 1992) ("Order Denying Stay"), Supp. App. at SA-61. The federal court also drew new congressional districts. See id., App. at A-53. No other congressional plans have been enacted through the legislative process or ordered by any court

since the 1990 census. Appellants appeal the federal court's order issuing legislative and congressional plans.

ARGUMENT

Voting is a fundamental right because it is preservative of all rights. Harman v. Forssenius, 380 U.S. 528, 537 (1965). At issue here is the opportunity for Minnesota citizens to exercise fully their fundamental right to vote. The federal court has acted to protect that right by issuing plans of legislative redistricting with de minimis population deviations among compact districts that seek to enhance the voting rights of minorities.

There are essentially two issues on appeal: (1) whether the federal court erred in not deferring to a state proceeding that did not include all of the parties before the federal court and that did not have in the pleadings before it additional claims presented in the federal action; and (2) whether the federal court's findings of fact and application of law were clearly erroneous. Appellants hope to overturn validly-ordered federal court plans for legislative and congressional redistricting and to implement a state court plan of legislative redistricting because of perceived partisan advantage.

I. THE FEDERAL COURT ACTED PROPERLY IN EXERCISING ITS JURISDICTION AND IN NOT DEFERRING TO THE STATE COURT.

A. The Federal Court's Actions Were Entirely Consistent with Germano Deference While the State Court Violated Those Deference Requirements.

Scott v. Germano, 381 U.S. 407, 409-10 (1965), reflects the principle that the federal judiciary should initially defer to state efforts to adopt redistricting plans, acting only

when the state fails to adopt valid plans in a timely fashion. See also Upham v. Seamon, 456 U.S. 37, 41 (1982); White v. Weiser, 412 U.S. 783, 794-95 (1973); Reynolds v. Sims, 377 U.S. 533, 586 (1964). This Court stated in Weiser:

> From the beginning, we have recognized that "reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites after having had an adequate opportunity to do so."

Weiser, 412 U.S. at 794-95 (citation omitted).

Primary authority over redistricting lies with state legislatures and not state courts. See id. Germano does not establish a superseding state court jurisdiction in reapportionment cases. See Skolnick v. State Election Board of Illinois, 336 F. Supp. 839, 871 (N.D. Ill. 1971). Recognition of the role of state courts as the final expositors of state law "implies no disregard for the primacy of the federal judiciary in deciding questions of federal law." Harman v. Forssenius, 380 U.S. at 535.

The federal court by order required deference to the legislative process. See August 21 Order, App. at A-115. The federal court concluded that governing law required "both [the] state and federal courts to defer to the legislature to draw a valid redistricting plan unless the legislature fails to act in a timely fashion." See id.; see also Order Denying Stay, Supp. App. at SA-60.

The federal court alone deferred to the legislative process, allowing the legislature and the Governor full opportunity to enact valid redistricting plans, consistent with the holdings in both Germano, 381 U.S. at 409, and Smiley v. Holm, 285 U.S. 355 (1932) (Minnesota redistricting is performed by the legislative "process," involving both the legislature and the Governor).

In accord with Germano, the federal court issued plans only after the legislative process failed to validly redistrict by late January 1992. In doing so, the federal court considered the likelihood of appeal of state court plans through the state appellate process and the probable later appeal to this Court for final disposition and noted the inevitable adverse effects of such delay on 1992 elections. See August 21 Order, App. at A-112, A-116.

Also in accord with Germano, the federal court fully resolved all matters before it, including claims not before the state court, in an effort to provide an expeditious and complete remedy for all parties and to resolve fully all constitutional and federal voting claims before it.

By contrast, the state court ignored the principle of deference. It disregarded the federal court's unanimous August 21 Order and issued its own plan of legislative redistricting less than one month before the January 1992 legislative session. See State Court Legislative Plan, App. at A-249. The federal court recognized that such an order was necessarily advisory, premature, and a clear interference with the legislative process. See Emison v. Growe, Civ. No. 4-91-202, Order of Stay of All Proceedings Before the Minnesota Special Redistricting Panel in Cotlow v. Growe No. C8-91-985 (hereinafter "Order of Stay") (D. Minn., Dec. 5, 1991), App. at A-150-151. The state court disregarded the federal court's determination that in any event the federal court would have to review any redistricting plans issued because of the federal voting rights claims before it. Rather, the state court attempted to decide the validity of Chapter 246 under the Voting Rights Act even though no such claims were pled in that action. Further, the state court based its plan on a pervasively unconstitutional law and on legislative committee proposals for amendments that never were enacted.

The state court's issuance of a legislative plan

conflicted with the federal court's ordered deference to the legislative process. See id.[5] The federal court therefore issued an Order of Stay on December 5, 1991, "[deeming] it self-evident that the existence of the state district court plan could improperly influence and interfere with the legislative process." February 19 Order, App. at A-23.

The state court in December 1991 failed to defer to the legislative process, instead issuing a plan that could not timely be reviewed and that the federal court ultimately found perpetuated Voting Rights Act violations. The state's legislative process failed in January 1992 to establish legislative and congressional redistricting plans. Only in these circumstances did the federal court act, pursuant to Germano, "to enter such orders as it deems appropriate," including its plans of legislative and congressional redistricting. See Germano, 381 U.S. at 409.

B. Abstention by the Federal Court Was Not Warranted in Light of Voting Rights Claims Before It, and Only the Federal Court Was Capable of Resolving All Issues Raised by the Parties in Both Actions.

Abstention is a narrow exception to a federal court's duty to adjudicate a controversy properly before it,[6] particularly where voting rights issues are presented. In such instances, a court should abstain only in the most extraordinary circumstances. See O'Hair v. White, 675

[5]In contrast to the state court, the federal court had undertaken the process of preparing contingent legislative and congressional redistricting plans that were unannounced and to be implemented only in the event that the legislative process failed to enact valid plans by January 20, 1992. See August 21 Order, App. at A-117. Cf. Weiser, 412 U.S. at 794-95.

[6]The federal court had subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343 and 42 U.S.C. § 1973. See February 19 Order, App. at A-16-17.

F.2d 680, 694 (5th Cir. 1982). This Court has expressed its reluctance to have federal courts defer to state courts in matters involving voting rights. In Harman v. Forssenius, 380 U.S. 528, (1965), a voting rights case, this Court found no abuse of discretion in the district court's refusal to abstain in favor of a state court. This Court stated, "the district court was thus faced with a claimed impairment of the fundamental civil rights of a broad class of citizens . . . . Given the importance and immediacy of the problem and the delay inherent in referring questions of state law to state tribunals, it is evident that the district court did not abuse its discretion in refusing to abstain . . . ." Id. at 537.

In this case, the federal complaints raised claims not before the state court. The Emison complaint alleged violations of the Voting Rights Act and sought affirmative relief. See Emison Complaint, App. at A-82-88. The Benson complaint raised several constitutional challenges to Chapter 246 and requested appropriate relief. See Benson Complaint, Supp. App. at SA-63. The federal court repeatedly stated that it could not abstain because of these issues unique to the federal action. See August 21 Order, App. at A-112-113; Order of Stay, App. at A-144-145; February 19 Order, App. at A-20-21 n.17.

The federal court resolved all outstanding issues by adjudicating claims that two separate groups of plaintiffs had chosen to bring before it. Once convened, "the jurisdiction of the district court so constituted . . . extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decisions of such of the questions as in its opinion effectively dispose of the case." Sterling v. Constantin, 287 U.S. 378, 393-94 (1932).

Pendency of a state proceeding is not a reason for a federal court to abstain. See McClellan v. Carland, 217 U.S. 268, 281-82 (1910). To the contrary, this Court has emphasized "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."

Colorado Riv. Water Conserv. Dist. v. United States, 424 U.S. 800, 817 (1976).

Appellants have identified no unique facts or issues supporting abstention. The federal court was the only court presented with Voting Rights Act issues and constitutional challenges to Chapter 246. The federal court properly resolved all issues before it, and, in so doing, it resolved all issues that were before the state court.

II. THE STATE COURT'S PLAN FOR LEGISLATIVE REDISTRICTING WAS NOT ENTITLED TO ISSUE PRECLUSIVE EFFECT.

Under the Full Faith and Credit Act, a valid and authenticated state judgment is entitled to full faith and credit in federal courts where the judgment would have preclusive effect under the state's laws.[7] See 28 U.S.C. § 1738; Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure, § 4469 at 659-60 (1981, supp. 1991). Where a second judgment inconsistent with the first is in fact reached, however, the second judgment prevails "whether the res judicata[8] effects of the first judgment were ignored by the parties or expressly rejected by the court in the second action." 18 Wright, Miller, & Cooper, § 4404 at 26 (citing authorities) (footnote added).

The state court's legislative redistricting plan was not offered by appellants as a judgment that would preclude legislative redistricting by the federal court. Where, as here, preclusion was not raised, giving effect to the second judgment is justified by the failure to argue preclusion. See id. at 26-27. Preclusion is an affirmative defense that is lost when not asserted. See id. at 26.

In any event, the state court's plan was not entitled to preclusive effect. Full faith and credit preclusion is governed by state law. See 28 U.S.C. § 1738; Marrese, 470 U.S. at 380. Under Minnesota law, application of issue preclusion is appropriate where (1) the issue was identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue. See Ellis v. Minneapolis Comm'n on Civil Rights, 319 N.W.2d 702, 704 (Minn. 1982). Appellants mistakenly conclude that the state order should have had preclusive effect in the federal proceeding.

First, the issues in the federal proceeding were not identical with the ones involved in the state action. The federal action involved Voting Rights Act claims and challenges to Chapter 246 not raised by the pleadings in the state action. See Order of Stay, App. at A-144-145. The first Ellis factor is not met.

Second, appellants argue that there was sufficient identity between the state and federal parties because of similar legal representation. In Minnesota, the "appearance" of a party necessary to apply issue preclusion is clearly either an actual adversarial appearance in litigation of one's own rights, see Margo-Kraft Distrib., Inc. v. Minneapolis Gas Co., 200 N.W.2d 45, 47 (Minn. 1972), or the exertion of sufficient control over the action in furtherance of one's own interests, even though not a party,

---

[7] Appellants separately argue "full faith and credit" and issue preclusion or "collateral estoppel." See Jurisdictional Statement at 11-13. Nevertheless, the preclusive effect of a state court's judgment in a federal proceeding is fully within the Full Faith and Credit Act, which, in turn, looks to the state's preclusion rules. See 18 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 4469 at 459-60 (1981, supp. 1991).

[8] As used by commentators, the term "res judicata" collectively refers to both "claim preclusion" and "issue preclusion." See 18 Wright, Miller, & Cooper, § 4402 at 6-7; see also Marrese, 470 U.S. at 376 n.1 (discussing this Court's use of the terms "claim preclusion" and "issue preclusion").

such that the non-party has effectively had its day in court, see Denzer v. Frisch, 430 N.W.2d 471, 473 (Minn. Ct. App. 1988).

Given this law, mere representation of some parties by the same counsel does not constitute an appearance for issue preclusion purposes, particularly where the federal proceeding included parties (i.e., the Benson appellees) neither involved in the state proceeding nor represented by counsel who appeared there. The presence in the federal action of the Benson appellees, who had no control over or other connection with the state case, prevents application of issue determinations made in that case to issues arising in the federal action. Cf. Ellis, 319 N.W.2d at 704. The third factor of the Ellis test is also therefore not met.

Finally, the Benson appellees had no "full and fair opportunity" to be heard on the adjudicated issues in the state proceeding, because they did not appear in that proceeding. There was a consistent challenge to the state court's jurisdiction to adjudicate Voting Rights Act § 2 issues at all, let alone to provide a full and fair opportunity that would serve as preclusion to parties not present in the state proceeding. See Cotlow v. Growe, MX 91-001562, Memorandum of Plaintiff - Intervenors Regarding Exclusive Federal Jurisdiction Over Voting Rights Act Claims (Minn. Spec. Redis. Panel, Oct. 7, 1991), Supp. App. at SA-107. Therefore, appellants have also clearly failed to meet the fourth factor of the Ellis test. Issue preclusion, because of all of these deficiencies, is manifestly not merited.

III. THE FEDERAL COURT ACTED PROPERLY IN ADJUDICATING THE VOTING RIGHTS ACT CLAIMS BEFORE IT, AND ITS ORDER WAS SUPPORTED BY THE EVIDENCE.

A. The Federal Court Had an Affirmative Obligation to Address the Voting Rights Act Claims Before It.

The Emison complaint alleged that legislative district boundaries on the Red Lake and White Earth Reservations and in Minneapolis violated Section 2(a) of the Voting Rights Act, 42 U.S.C. § 1973(a) (1988). The federal court therefore was obligated to determine "whether voting rights violations have been proven in this case." February 19 Order, App. at A-28.

The federal court also was required to ensure that any plan, whether enacted through the legislative process or issued by a court, provided adequate relief if Voting Rights Act violations were found. See August 21 Order, App. at A-116.

Appellants' contention that the state court properly addressed Voting Rights Act claims is meritless and would, if accepted, create dangerous precedent. Courts must not be permitted to make determinations of law and fact as to federal statutes without a case or controversy being raised by the pleadings. Further, to allow Section 2 of the Voting Rights Act to be enforced by elected state judges undermines the Act and jeopardizes the rights that it is intended to protect. The damage to the Act and to voting rights is particularly troublesome and creates potential for abuse if a state court can sua sponte issue an order that binds parties who have properly asserted Voting Rights Act claims in federal proceedings.

B. The Federal Court Properly Found Voting Rights Act Violations.

The factual findings of a district court are not to be set aside unless "clearly erroneous." Fed. R. Civ. P. 52(a). Appellants fail to demonstrate that the federal court's findings of minority voting rights violations were clearly in error.

1. The Federal Court Was Not Obligated First to Find That the Gingles Preconditions Were Met.

Appellants rely on Thornburg v. Gingles, 478 U.S. 30 (1986), a matter addressing multi-member districts, as requiring three preconditions for a finding of a Voting Rights Act violation. However, reliance on Gingles in this case, which involves single-member legislative districts, is misplaced. This Court in Gingles specifically noted that it had "no occasion to consider whether the standards we apply [to multi-member district vote dilution claims] . . . are fully pertinent to other sorts of vote dilution claims, such as . . . single member districts." Id. at 47 n.12.

2. The Evidence of Voting Rights Act Violations Clearly Was Sufficient.

Voting Rights Act § 2 provides that a violation is established if, judged on the totality of circumstances, the political election processes in a state are not open to equal participation by members of protected classes. See 42 U.S.C. § 1973(b) (1988). The Senate Judiciary Committee Report that accompanied the 1982 bill amending § 2 identified factors to be considered in determining the "totality of circumstances" that could show a violation of the Voting Rights Act within the meaning of § 2. S. Rep. No. 417, 97th Cong., 2d Sess. 28-29, reprinted in 1982 U.S. Code Cong. & Admin. News 177, 206-07 (hereinafter "1982 U.S.C.C.A.N."); February 19 Order, App. at A-31-32 (quoting factors).

The Senate Report's factors need not all be proven by plaintiffs, nor must a majority of the factors "point one way or the other." 1982 U.S.C.C.A.N. at 207. "The failure . . . to establish any particular factor is not rebuttal evidence of non-dilution." Id. at 207 n.118.

The federal court analyzed and applied the Senate Report's factors, found that legislative districts violated the Voting Rights Act, and determined that neither Chapter 246 nor the state court's similar plan corrected those violations. See February 19 Order, App. at A-31-41.

Most indicative of § 2 violations was the lack of minority representation in the Minnesota legislature. See id., App. at A-33-35. The only factor expressly mentioned in § 2 is "the extent to which members of a protected class have been elected to office in the State or political subdivision. . . ." 42 U.S.C. § 1973(b) (1988). The state senate currently has no minority members from Minneapolis, nor has a minority senator been elected from Minneapolis in recent history. See February 19 Order, App. at A-33. There is only one state representative from Minneapolis who is a member of a minority group, and Minneapolis has elected just two minority house members in the past decade. See id. Both were from the same district. See id.

The 1982 legislative districts, which did not include a "super-majority" minority senate district, resulted in election of no minority senators. See id., App. at A-33-34. These results are entitled to great weight as evidence of Voting Rights Act violations, because 1982 amendments to the Act sought to "make clear that certain practices or procedures that result in denial or abridgement of the right to vote are forbidden even though the absence of proof of discriminatory intent protects them from constitutional challenge." See id.

Minneapolis minority legislative representation is significantly below the proportion of minorities in the city's population. See id., App. at A-34. Proportional representation would entitle minorities to four seats of the eighteen available in Minneapolis districts. See id. Nevertheless, minorities have held just one seat in the past decade. See id. While proportional representation is not an entitlement under the Voting Rights Act, lack of proportional representation of minorities is one of the "circumstances" suggested in the Senate Report as indicating a § 2 violation. See 1982 U.S.C.C.A.N. at 206-07.

The federal court also observed that the only minority representative now in the state house of representatives

was elected from a super-majority minority district. See February 19 Order, App. at A-34-35. This suggests the representational effect that can be achieved by concentrating minorities in super-majority minority districts to allow the effective assertion of minority voting rights through enhancement of bloc voting. Cf. 1982 U.S.C.C.A.N. at 206-07.

A "super-majority" concentration can be achieved in a Minneapolis senate district. See February 19 Order, App. at A-35. This senate district, number 59 in the federal court's plan, concentrates minorities in proportions similar to those previously found to be effective in achieving minority representation in the state legislature.[9] See id. The super-majority minority district seeks to correct the historical lack of minority representation.

In findingVoting Rights Act violations, the federal court also relied upon the extent to which minorities in Minnesota bore the effects of discrimination in education, employment, or health. See id. The federal court noted recent judicial findings that the Minneapolis public school district had "acted intentionally to maintain or increase racial segregation in the schools." Id. (quoting Booker v. Special School Dist. No. 1, Minneapolis, 451 F. Supp. 659, 660 (D. Minn. 1978)). Minneapolis school district policies had been found to be "especially offensive due to

[9]Appellants suggest that such a district is opposed by "leaders of the Black community in Minneapolis. . . ."Jurisdictional Statement at 19 n. 12. But see Supp. App. at SA-231.

Appellants also suggest that the federal court failed to draw a true super-majority minority district because of voting age considerations. See Jurisdictional Statement at 16-17 & n.9; App. at A-381, A-383. Appellants fail to note that redistricting is based upon total population; that the data upon which they rely are now almost two years old; and that the plan presumably will be in effect for ten years. The federal court's plan in any event creates a district with a minority population fully ten percent higher than any minority district drawn by the state court. See App. at A-383.

defendant's knowledge of the extensive nature of housing segregation within its bounds." Id. (quoting Booker v. Special School Dist. No. 1, Minneapolis, 351 F. Supp. 799, 809 (D. Minn. 1972)) (emphasis added).[10]

The federal court found that the legislative districts created by Chapter 246 and by the state court plan reflected "voting practices or procedures that may enhance the opportunity for discrimination . . .," another of the Senate Report's factors. See id. , App. at A-35-36; Order Denying Stay, Supp. App. at SA-61. ("[T]he plan proposed by [appellant legislature] and adopted by the state court is not only gerrymandered to protect incumbents in Minneapolis, foretelling the continued dilution of minority voting rights, but it also contains unwarranted population deviations and lacks compactness statewide" (emphasis added)).

The federal court found that Chapter 246 was designed "to protect incumbents in the city's overwhelmingly white legislative delegation." February 19 Order, App. at A-36. Of eighteen Minneapolis legislators, Chapter 246 paired no incumbent senators; house members were paired only once. See id. The federal court stated that incumbent pairing should have been inevitable in light of the population decline in Minneapolis. See id., App. at A-36 & n.37. The court concluded that this avoidance of incumbent pairing

[10]Appellants challenge the federal court's reference to a newspaper publication article reflecting continued performance gaps between minorities and whites in the Minneapolis school district. See Jurisdictional Statement at 19-20. It is clear from even a cursory reading of the federal court's February 19 Order that the court's primary reliance was on express judicial findings made as recently as 1978. See February 19 Order, App. at A-35.

Appellants additionally criticize the federal court's reference to Minnesota's history of official discrimination, see Jurisdictional Statement at 19, but they fail to note that the court expressly did not rely on that history, see February 19 Order, App. at A-36 n.35. It is clear both from the federal court's language in footnote 35 and its ultimate conclusions that the court instead relied on other sufficient evidence of Voting Rights Act violations. See id. at A-36 n.35, A-38.

was apparently done in "priority over the protection of minority interests in the plan proposed by [appellant legislature]." Id., App. at A-36.

Incumbent protection by Chapter 246 and the state court's plan, see id., App. at A-36; Order Denying Stay, Supp. App. at SA-61, was clearly not "state policy", see February 19 Order, App. at A-36-37 n.37. To the contrary, state policy found in a joint legislative resolution calls for avoidance of dilution of minority voting strength and for increases in the probability of election of minority legislators. See id.

Incumbent protection is a voting practice and procedure that enhances the opportunity for discrimination against minorities. See id., App. at A-35-37. Accordingly, the practice of incumbent protection at the expense of minority representation is a factor weighing in the "totality of circumstances" under § 2, and it is an additional circumstance that demonstrates a Voting Rights Act violation. Cf. 1982 U.S.C.C.A.N. at 206.

The facts demonstrated minority vote dilution in Minneapolis, in violation of § 2 of the Voting Rights Act. See February 19 Order, App. at A-37-38. The federal court stated:

> The all-white senate delegation from Minneapolis, the significant proportional underrepresentation of minorities from the overall legislative delegation from Minneapolis, the apparent attempt to protect incumbencies at the expense of minority concentrations, the fragmentation of a geographically cohesive minority population into different senate districts, the educational disadvantage of Minneapolis minorities, the segregation in the Minneapolis school districts, and the judicial experience showing the need for super-majority minority districts, when considered all together, are sufficient to create a prima facie case in the totality of the circumstances which exists here.

Id., App. at A-38.

In remedying violations, the federal court rejected appellant legislature's proposed plan, which essentially was Chapter 246 as it was proposed to be amended by Senate File 1596. See id., App. at A-38-39. The federal court found that this plan and the state court's plan, adopted from appellant legislature's proposal, perpetuated Voting Rights Act violations. See id., App. at A-39. The federal court therefore issued a plan that remedied Voting Rights Act violations by creating a super-majority minority senate district. See id., App. at A-39-41. The federal court's action was fully supported by the facts, and its plan was necessary to effectuate the purposes of the Act.

IV. THE FEDERAL COURT ACTED IN ACCORD WITH STATE POLICY AND ALL REQUIREMENTS FOR COURT-ORDERED REDISTRICTING.

A. The Federal Court's Plans Are Properly Based on State Policy.

A court must be guided by state policy in redistricting. See LaComb v. Growe, 541 F. Supp. 145, 151 (D. Minn. 1982). In drawing its plans, the federal court considered criteria in a joint legislative resolution, which appellant legislature has acknowledged reflects state policy. See February 19 Order, App. at A-44-45 & n.44. The resolution established 2%, plus or minus, as the maximum permissible population deviation from the ideal for legislative districts. Id., App. at A-44.

The federal court's house plan has a maximum total population deviation of 1.40% (from the maximum negative deviation to the maximum positive deviation), and its senate plan has a total maximum deviation of 1.20%. See id., App. at A-47.

By keeping deviations to a minimum, the federal court's

legislative plan also met the requirements of the Minnesota Constitution, article 4, § 2, which provides that "representation in both houses shall be apportioned equally throughout the different sections of the state in proportion to the population thereof." State policy requires population equality in legislative districts, and the federal court's plan reflects that policy better than any other plans considered. See February 19 Order, App. at A-46-48.

The federal court's congressional redistricting plan provides the smallest population deviations achievable. See February 19 Order, App. at A-55.

The federal court's legislative plan also achieves better than appellant legislature's plan the state policy goals of preserving minority voting strength and increasing probability of minority representation. See id., App. at A-45. This court's plan creates a super-majority minority senate district in Minneapolis with a total minority concentration of 60% and African-American concentration of 43%, a concentration proven adequate to elect minority members to the house from Minneapolis. See id., App. at A-41. The legislative plan proposed by appellant legislature contains no such district.

Additionally, both the federal court's legislative and congressional plan create districts more compact than those proposed by appellant legislature, meeting another requirement of state policy. See id., App. at A-44. In accord with this state policy, a recent scholarly article suggests that a requirement of electoral district compactness must be imposed as a procedural safeguard against partisan gerrymandering. See Polsby and Popper, The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering, 9 Yale Law & Policy Review 301 (1991) (hereinafter "Polsby and Popper"). Polsby and Popper define gerrymandering as a manipulation of district lines for partisan purposes. See id. at 301-02.

The effect of gerrymandering on an individual's vote is

essentially the same as the evil corrected by the apportionment cases in establishing the "one person, one vote" standard mandating that electoral districts have equal populations. See Reynolds v. Sims, 377 U.S. 533 (1964) (state legislatures); Wesberry v. Sanders, 376 U.S. 1 (1964) (federal districts); Baker v. Carr, 369 U.S. 186 (1962); see generally Polsby and Popper at 321-26.

Polsby and Popper conclude that the most appropriate remedy for gerrymandering is to require that:

> In addition to adhering to criteria which mandate that representational districts be composed of contiguous territories and have equal populations, . . . those who define district boundaries must also be required to respect a third criterion, the constraint of compactness. Without the ability to distend district lines so as to include or exclude blocks of voters whose political loyalties are known, it is not practically possible to gerrymander. The diagnostic mark of a gerrymander is the noncompact district.

Polsby and Popper at 302 (emphasis added).

The federal court analyzed its legislative redistricting plan and the other submitted plans using both a visual compactness analysis and a statistical analysis suggested by Polsby and Popper. See February 19 Order, Exhibits, Supp. App. at SA-31, 46. The federal court's analysis demonstrated that its legislative plan was by all measures more compact than the other plans before it, except that the federal court's plan and appellant legislature's plan scored the same for senate district compactness on the Polsby and Popper index.[11] See February 19 Order, Exhibits, Supp.

---

[11]The federal court's creation of the super-majority minority senate district in Minneapolis reduced its plan ratio from .51 to .40. See February 19 order, Exhibits, Supp. App. at SA-47 n.2. Without that district, which appellant legislature's plan does not contain, the federal

App. at SA-31, 46.

Similarly, the federal court's congressional plan is more compact than the plan proposed by appellant legislature. See Polsby Indices, Supp. App. at SA-230.[12]

B. The Federal Court Was Not Bound by Weiser or Upham to Follow Chapter 246, Chapter 246 As the Legislature Proposed to Amend It, or Chapter 246 as Adopted by the State Court.

Appellant legislature failed to pass a constitutional legislative redistricting plan acceptable to the Governor and therefore cognizable as state policy. It is disingenuous for appellants now to argue that a hastily drawn, broadly unconstitutional bill, which became law because of a procedurally invalid veto, should have been used by the federal court in drawing its own legislative redistricting plan.

No party can reasonably suggest that an election could be held under Chapter 246. The federal court specifically found that it "could not discern any state policy from the unconstitutional Chapter 246." Order Denying Stay, Supp. App. at SA-61. The federal court could not engage in a statewide guessing game regarding what the legislature might have done to correct the widespread infirmities of Chapter 246, had the legislature recognized them prior to that bill's passage. Precedent regarding what is "legislative history" and this Court's preference to leave to the legislative process the first opportunity to re-draw legislative district lines indicate that it would have been improper for the federal court to have tried to ascertain

court's plan is significantly more compact than appellant legislature's plan. See id.

[12]The Polsby and Popper index for the congressional plans has been adjusted to take into account the use of natural boundaries, such as rivers. See Polsby and Popper at 349 n.206 (suggesting adjustment).

what the legislature might have done.[13] The federal court instead properly drew new lines only after the legislative process failed to accomplish the task of redistricting. In so doing, the court replaced a plan adjudicated to have pervasive constitutional and statutory defects. Cf. Upham v. Seamon, 456 U.S. 37, 41-42 (1982); White v. Weiser, 412 U.S. 783, 794-95 (1973).

Reduced to its essence, appellants' argument on this point is that the federal court committed error by not following the "state policy" of legislative redistricting embodied in Chapter 246 in drawing its legislative plan. Relying on Weiser and Upham, appellants argue that the federal court's relief should have been narrowly circumscribed. This view is incorrect.

The Weiser and Upham decisions both involved Texas redistricting plans that substantially met constitutional and statutory requirements. See generally Upham, 456 U.S. 37; Weiser, 412 U.S. 783. By contrast, the federal and state courts here declared Chapter 246 to be unconstitutional due to numerous defects. The federal court found statutory violations as well and could not discern any state policy.

1. Chapter 246 Was Not Entitled to Deference As State Policy.

[13]The Minnesota Supreme Court described materials that are "legislative history" in Handle With Care v. Department of Human Serv., 406 N.W.2d 518, 522 (Minn. 1987):

> [W]e may 'consider events leading up to [the legislation], the history of its passage, and any modifications made during its course.' We look to committee reports and journal entries. In addition the legislature now tape-records its committee meetings and floor debates, and we have, on occasion, considered transcripts of those recordings.

No committee reports or journal entries were available for the federal court's use. No minutes from the House Redistricting Committee meeting at which Chapter 246 was considered were available.

The federal court did not have a map of the legislative districts created by Chapter 246. Instead, appellant legislature provided the court only with maps that reflected how the legislative majority caucuses intended to amend Chapter 246 when the legislature reconvened.

Furthermore, unlike the plan in Weiser, the maximum population deviations in Chapter 246 were not limited to 2.43% from the ideal, but ranged as much as 45.10% from the ideal. See Emison v. Growe, Civ. No. 4-91-202, Dempsey Affidavit (D.Minn., Oct. 10, 1991), Supp. App. at SA-99.[14]

Chapter 246 created noncontiguous districts, in violation of Minnesota Constitution, article 4, § 3. See, e.g., Legislative Maps, Supp. App. at SA-184. Additionally, Chapter 246 in several instances assigned the same territory to different districts. See, e.g., id., Supp. App. at SA-188. Because of the breadth of these defects and the variety of possible corrections, the federal court's conclusion that it "could not discern any state policy from the unconstitutional Chapter 246" is certainly not clear error. See Order Denying Stay, Supp. App. at SA-61.

Weiser supports the federal court's action. Even if state policy is discernible, "the District Court should defer to state policy in fashioning relief only where that policy is consistent with constitutional norms and is not itself vulnerable to legal challenge." Weiser, 412 U.S. at 797 (emphasis added). See also Karcher v. Daggett, 466 U.S. 910, 911 (1984) (Stevens, J., concurring) ("Once a constitutional violation has been found, a district court has broad discretion to fashion an appropriate remedy.").

Similarly, in Upham, 456 U.S. 37, the congressional redistricting plan contained only minimal flaws, allowing a court to perceive and preserve state policy by making only a few changes. See generally id. The federal court here distinguished Weiser and Upham and found that "Chapter

[14]In some instances, district lines necessarily were assumed in light of the inadequate descriptions in Chapter 246.

246 contained numerous infirmities, including excessive population disparities and noncontiguous districts." February 19 Order, App. at A-43 & n.43, A-52 & n.50.[15] The court recognized Chapter 246 for what it was -- "a hastily drafted bill containing numerous errors" that were "constitutional defects," a fact acknowledged by all the parties. Id., App. at A-43.

The federal court could only speculate as to how legislators might have corrected Chapter 246, had its defects been known at the time of passage. For example, correction of population disparities requires changes not only to the boundaries of the affected districts, but also to one or more neighboring districts. If contiguous districts with opposite but corresponding population deviations cannot be identified, then non-adjoining, more distant districts must be identified and changed, necessitating alterations to districts adjoining them. This "falling domino" process demonstrates the impossibility of determining any cognizable legislative intent from what remains of Chapter 246 after removal of unconstitutional or otherwise invalid legislative districts. Simply stated, any plan requiring such extensive redrafting necessarily involves speculation regarding state policy.

[15]In addition to the grounds relied upon by the federal court, Weiser is distinguishable on other grounds. First, Weiser involved congressional redistricting, where stricter population equality is required, and the rejected plan in Weiser "achieved the goal of population equality to a greater extent than did [the accepted] Plan C." Weiser, 412 U.S. at 796. Also, the lower court in Weiser "did not suggest or hold that the legislative policy of districting so as to preserve the constituencies of congressional incumbents was unconstitutional or even undesirable." Id. at 797. In this case, the federal court found that Chapter 246 was unconstitutional and that its incumbent protection goals in the City of Minneapolis violated the voting rights of minority residents of that city. See February 19 Order, App. at A-35-38.

2. The Proposed Amendments to Chapter 246 Were Not Entitled to Deference As State Policy.

The federal court properly rejected as a statement of state policy the remedies proposed by Senate File 1596,[16] which was passed by the legislature but vetoed by the Governor in January 1992. See February 19 Order, App. at A-43. Because the bill was vetoed, it did not constitute state policy to which a court should defer. See id. (citations omitted). Senate File 1596 was entitled to no greater deference than any other proposed corrections.

Further, the federal court held that "Chapter 246, as well as the modifications proposed in Senate File 1596, do not [sic] provide a remedy for the diminution of minority voting rights we have addressed." Id., App. at A-43. On that ground as well, Chapter 246 and Senate File 1596 were not entitled to deference. See id.

3. Appellant Legislature's Congressional Plan Was Not Entitled to Deference As State Policy.

Senate File 1597, a congressional redistricting bill passed by the legislature in January 1992 but vetoed by the Governor, was not entitled to deference as state policy. A vetoed bill does not constitute any evidence of state policy. See id., App. at A-53; Cotlow v. Growe, C8-91-985, Procedural Order No. 7 (Minn. Spec. Redis. Panel, Mar. 3, 1992 ("Procedural Order No. 7"), App. at A-445-446 n.1.

The federal court's order and plan is the only adjudication on current congressional redistricting. The state court has not issued a congressional redistricting plan, and it has indicated that it will not do so, given the

[16]Senate File 1596, covering 63 pages of text, proposed to correct 160 errors in more than 30 state senate districts and house districts in approximately one-third of the state's 87 counties. See February 19 Order, App. at A-52 n.50; Senate File 1596, Supp. App. at SA-120.

existence of the federal court's plan. See Procedural Order No. 7, App. at A-442-446.

V. THE CLAIMS ASSERTED BEFORE THE FEDERAL COURT WERE NOT RENDERED MOOT.

Appellants did not raise the issue of mootness in the action below and here have conspicuously failed to note the standards applicable to a mootness claim. An action is moot only when the issues presented are no longer "live" or when the parties lack a "legally cognizable interest in the outcome." See County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). "[T]he burden of demonstrating mootness is a heavy one." Id. (quotation omitted). The central question is "whether decision of a once living dispute continues to be justified by a sufficient prospect that the decision will have an impact on the parties." 13A C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3533 at 212 (1984, supp. 1991).

Both the Emison and Benson appellees sought affirmative relief from the federal court. See Emison Complaint, App. at A-90-91; Benson Complaint, Supp. App. at SA-63. Until the relief sought by the Emison and Benson appellees was granted, their consolidated actions were not moot. Without complete relief for the injury, the injury still existed. Cf. 13A Wright, Miller & Cooper, § 3533.2 at 238-39 ("Decision remains appropriate [and case is not moot although some issues are resolved] if there is a reasonable prospect that the court may award additional relief.").

CONCLUSION

Appellants have failed to demonstrate that the federal court's findings of fact and application of law were clearly erroneous. The federal court was not required to defer to the state court, and it properly retained jurisdiction. The

federal court correctly determined that plans based on the unconstitutional provisions of Chapter 246 perpetuated Voting Rights Act violations. The federal plan for legislative redistricting meets all constitutional and statutory requirements. Overturning it and allowing implementation of the state court's plan would create a precedent not only of allowing state courts to enforce § 2 of the Voting Rights Act, but also would allow them to do so when no § 2 claims are presented in the pleadings before them.

The federal court's congressional redistricting plan, as the only congressional plan enacted or ordered after the 1990 census, is valid and should be affirmed.

For the above stated reasons, the Emison appellees, the Benson appellees, and appellee Lundgren respectfully request that this Court dismiss appellants' jurisdictional statement and this appeal.

Dated: March 21, 1992.

Repsectively submitted,

POPHAM, HAIK, SCHNOBRICH & KAUFMAN, LTD.

Bruse D. Willis
(Council of Record)
Mark B. Peterson
Patrick A. Reinken

3300 Piper Jaffray Tower
222 Ninth Street South
Minneapolis, Minnesota 55402
(612) 333-4800

Attorneys for appellees Emison, Fairbanks, Iverson, Dean, Castillo, Freeman, and Lo, inidividually and on behalf of all citizens and voters of the State of Minnesota similarly situated.

O'NEILL, BURKE, O'NEILL, LEONARD AND O'BRIEN, LTD.

Joseph T. O'Neill
Eldon J. Spencer, Jr.

800 Norwest Center
55 East Fifth Street
St. Paul, Minnesota 55101
(612) 2227-9505

Attorneys for appellees Benson, Dempsey, Hettig, Harmon, Peterson, Pidcock, and Ringsmuth

NICKLAUS LAW FIRM

Robert A. Nicklaus

P.O. Box 116
103 West Second Street
Chaska, Minnesota 55318
(612) 448-4747

LANG, PAULY & GREGERSON, LTD.

Mark A. Johnson
Todd A. Settler

4400 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
(612) 338-0755

Attorneys for defendant Mark Lundgren, Carver County Auditor, individually and on behalf of all county auditors of the State of Minnesota